

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

INSURANCE COMPANY OF THE WEST,

Plaintiff,

V.

AFFORD-A-HOME, INC., et al.,

Defendants.

CASE NO. C14-5350 BHS

ORDER RESERVING RULING
AND REQUESTING
ADDITIONAL BRIEFING ON
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff Insurance Company of the West’s (“ICW”) motion for summary judgment (Dkt. 12). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby (1) denies Defendants’ request to dismiss this case for lack of subject matter jurisdiction, (2) reserves ruling on ICW’s motion, and (3) requests additional briefing as discussed herein.

I. PROCEDURAL HISTORY

On April 29, 2014, ICW filed an indemnification action against Defendants Afford-A-Home, Inc., Harold Janaszak, and Donna Janaszak (“Defendants”). Dkt. 1.

1 ICW alleges that Defendants breached their Indemnity Agreement with ICW by failing to
2 indemnify ICW for payments made on a performance bond. *Id.* at 3.

3 On July 1, 2014, ICW moved for summary judgment. Dkt. 12. On July 28, 2014,
4 Defendants responded. Dkt. 17. On August 1, 2014, ICW replied. Dkt. 20.

5 **II. FACTUAL BACKGROUND**

6 ICW is a California corporation authorized to post surety bonds in Washington.
7 Dkt. 1 at 1. Defendant Afford-A-Home is a Washington corporation. *Id.* Defendants
8 Harold and Donna Janaszak are Washington residents. *Id.*

9 In 2007, ICW posted two surety bonds—a performance bond and a maintenance
10 bond—to the City of Buckley for the construction of a subdivision. Dkt. 1 at 2. The
11 performance bond guaranteed the construction of the subdivision in the amount of
12 \$541,296.25. Dkt. 14, Declaration of Leonard Huseby (“Huseby Dec.”), Ex. 2. The
13 maintenance bond guaranteed the replacement or correction of items constructed in the
14 subdivision in the amount of \$486,521.05.¹ *Id.*

15 In consideration for posting these bonds, Defendants executed an Indemnity
16 Agreement in favor of ICW. Huseby Dec., Ex. 1. Under the Indemnity Agreement,
17 Defendants agreed to indemnify and hold ICW harmless from all losses resulting from
18 posting the bonds. *Id.* at 1. Defendants also agreed that if claims were made against the
19 bonds they would, upon demand, deposit funds with ICW sufficient to indemnify ICW
20 from all anticipated claims. *Id.* at 1–2.

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¹ The maintenance bond is not at issue in this case.

III. DISCUSSION

ICW moves for summary judgment, arguing that Defendants breached the Indemnity Agreement by failing to post the requested collateral and by failing to indemnify ICW. Dkt. 12 at 5. ICW seeks summary judgment requiring Defendants to indemnify ICW for claims paid and expenses incurred, as well as a judgment specifically enforcing Defendants' obligations under the Indemnity Agreement. *Id.* at 2. In response, Defendants argue that the Court lacks subject matter jurisdiction, ICW breached its fiduciary duty of good faith, and ICW is not entitled to damages or specific performance. Dkt. 17.

A. Subject Matter Jurisdiction

Defendants argue that the Court lacks subject matter jurisdiction. Dkt. 17 at 5–6. According to Defendants, the performance bond requires resolution of this case in Washington state courts. *Id.* Defendants therefore argue that the Court must dismiss this case. *Id.* at 6.

Defendants focus on the language of the bond rather than the Indemnity Agreement. The Indemnity Agreement, however, is the contract at issue in this case. Defendants fail to cite any authority or provision of the Indemnity Agreement that divests the Court of diversity jurisdiction under 28 U.S.C. § 1332(a). Moreover, even if RCW 39.08.010 controlled, the jurisdiction provision is not exclusive.

Accordingly, the Court has subject matter jurisdiction. The Court denies Defendants' request to dismiss this case for lack of subject matter jurisdiction.

1 **B. ICW's Motion for Summary Judgment**

2 The Court reserves ruling on ICW's motion with respect to the issues of liability,
3 damages, and specific performance.

4 **C. Additional Briefing**

5 In their briefing, the parties primarily focus on whether ICW made payments on
6 the performance bond under "the reasonable belief that it was liable for the amount paid
7 or that it was expedient under all the circumstances to make such payment." Huseby
8 Dec., Ex. 1 at 1. The Court asks the parties to submit additional briefing on the following
9 Indemnity Agreement provision:

10 If the Undersigned desire a claim against the Surety to be resisted,
11 the Undersigned shall (a) make written request to the Surety to defend
12 against the claim including a statement of the basis for the defense, (b)
13 simultaneously deposit with the Surety cash or collateral acceptable to the
14 Surety in kind and amount, sufficient to cover the claim and any costs,
15 interest, attorney fees, sanctions or other costs that may be awarded in any
16 judgment or otherwise, and (c) either simultaneously deposit cash or
17 collateral satisfactory to the Surety in an amount sufficient to cover the
18 expenses and attorney fees of defending against the claim or provide and
19 pay the fees and expenses of counsel acceptable to the Surety to conduct the
20 defense.

21 *Id.* Although the parties did not brief this provision, it does not appear that there is any
22 evidence that Defendants invoked or complied with this provision.

23 The parties should simultaneously file opening briefs addressing this provision by
24 October 10, 2014. The parties should file responsive briefs by October 17, 2014. Briefs
25 should be no longer than ten pages.

IV. ORDER

2 Therefore, it is hereby **ORDERED** that Defendants' request to dismiss this case
3 for lack of subject matter jurisdiction is **DENIED**. The Court **RESERVES ruling** on
4 ICW's motion for summary judgment (Dkt. 12). The Court requests additional briefing
5 on the Indemnity Agreement provision as discussed herein, and ICW's motion is renoted
6 to October 17, 2014.

Dated this 23rd day of September, 2014.



BENJAMIN H. SETTLE
United States District Judge